

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of February, two thousand sixteen.

PRESENT:

PIERRE N. LEVAL,
ROSEMARY S. POOLER,
GERARD E. LYNCH,
Circuit Judges.

HUA ZHENG,
Petitioner,

v.

13-4149
NAC

LORETTA E. LYNCH, UNITED STATES
ATTORNEY GENERAL,*
Respondent.

FOR PETITIONER: Nataliya I. Gavlin, New York, New York.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Loretta E. Lynch is automatically substituted for former Attorney General Eric H. Holder, Jr.

1 **FOR RESPONDENT:** **Stuart F. Delery, Assistant Attorney**
2 **General; Katharine E. Clark, Senior**
3 **Litigation Counsel; Patricia E.**
4 **Bruckner, Trial Attorney, Office of**
5 **Immigration Litigation, Civil**
6 **Division, United States Department**
7 **of Justice, Washington D.C.**
8

9 UPON DUE CONSIDERATION of this petition for review of a
10 Board of Immigration Appeals ("BIA") decision, it is hereby
11 ORDERED, ADJUDGED, AND DECREED that the petition for review
12 is DENIED.

13 Petitioner Hua Zheng, a native and citizen of China,
14 seeks review of a September 30, 2013 decision of the BIA
15 denying her motion to reopen her case. *In re Hua Zheng*, No.
16 A079 114 543 (B.I.A. Sept. 30, 2013). We assume the
17 parties' familiarity with the underlying facts and
18 procedural history.

19 "We review the denial of motions to reopen immigration
20 proceedings for abuse of discretion." *Ali v. Gonzales*, 448
21 F.3d 515, 517 (2d Cir. 2006). A motion to reopen must be
22 filed within 90 days of a final administrative order of
23 removal. 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R.
24 § 1003.2(c)(2). Zheng filed this motion more than three
25 years after the agency entered an order of removal against
26 her. Her motion was therefore untimely.

1 Zheng argues, however, that the time limitation should
2 be tolled, because her counsel was ineffective by not
3 pursuing cancellation of removal before the immigration
4 judge. In order to benefit from equitable tolling, a
5 petitioner must comply with certain procedural requirements,
6 and must show prejudice as a result of the ineffective
7 assistance of counsel. *Rashid v. Mukasey*, 533 F.3d 127,
8 130-31 (2d Cir. 2008). A showing of prejudice requires that
9 an alien make a prima facie showing of eligibility for the
10 requested relief. *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir.
11 1994).

12 Zheng claimed prejudice from her attorney's failure to
13 pursue cancellation of removal under 8 U.S.C. § 1229b(b)(1)
14 and her attorney's statement, without investigating or
15 consulting with Zheng, that she could not establish
16 continuous presence in the United States, as required under
17 that statute. She argues that the BIA abused its discretion
18 in concluding that she had not made a prima facie showing of
19 eligibility for cancellation of removal. Specifically, she
20 argues that the BIA should have credited an identification
21 card issued in the United States in 1996 and photographs of
22 herself allegedly in the United States in 1996, 1997, and
23 1998.

1 The BIA found that Zheng had failed to demonstrate ten
2 years of continuous physical presence in the United States, as
3 required for cancellation of removal. See 8 U.S.C.
4 § 1229b(b)(1)(A). As to the documentary evidence that Zheng
5 argues the BIA should have credited, the BIA either discounted
6 or did not explicitly address it in its opinion. To support
7 her presence in the United States during the years 1996 and
8 1997, Zheng submitted a New York Language Institute
9 identification card issued in the name of "Wanda Zheng." But
10 Zheng has not explained whether she is also known by Wanda,
11 and on her applications for cancellation and removal, she
12 responded "no" when asked whether she uses any alias or other
13 names. See *INS v. Abudu*, 485 U.S. 94, 109-10 (1988)
14 (recognizing that the alien "bears a heavy burden" in
15 demonstrating that reopening is warranted, and that facts and
16 ambiguities need not be viewed in the light most favorable to
17 the movant on a motion to reopen). While the BIA did not
18 address Zheng's personal photographs, we do not require the
19 BIA to expressly refute each argument or piece of evidence,
20 and we presume that it has taken into account the evidence
21 before it unless the record suggests otherwise. *Jian Hui Shao*
22 *v. Mukasey*, 546 F.3d 138, 169 (2d Cir. 2008); *Xiao Ji Chen v.*
23 *U.S. Dep't of Justice*, 471 F.3d 315, 337 n.17 (2d Cir. 2006).

1 We find no abuse of discretion here. The photographs
2 either were not identifiable as taken in the United States or
3 do not have legible date stamps. Aside from the card and the
4 photographs, Zheng offers no other evidence of her alleged
5 presence in the United States from 1996 to 1999. Given that
6 the record supports the BIA's findings concerning Zheng's
7 evidence, the BIA did not abuse its discretion in finding that
8 she had not made a prima facie showing of eligibility for
9 cancellation. Absent prima facie eligibility, she cannot show
10 prejudice required to except her motion from the time
11 limitation.

12 For the foregoing reasons, the petition for review is
13 DENIED. As we have completed our review, the pending motion
14 for a stay of removal in this petition is DISMISSED as moot.

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16 FOR THE COURT:
17 Catherine O'Hagan Wolfe, Clerk
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